

FILE NO. _____

STATE OF MINNESOTA

IN SUPREME COURT

In Re Petition for Disciplinary Action
against BENJAMIN EUGENE MYERS,
a Minnesota Attorney,
Registration No. 341447.

**AMENDED PETITION FOR
DISCIPLINARY ACTION**

TO THE SUPREME COURT OF THE STATE OF MINNESOTA:

The Director of the Office of Lawyers Professional Responsibility, hereinafter Director, files this petition upon the parties' agreement pursuant to Rules 10(a) and 12(a), Rules on Lawyers Professional Responsibility (RLPR). The Director alleges:

The above-named attorney, hereinafter respondent, was admitted to practice law in Minnesota on October 29, 2004. Respondent currently practices law in Minneapolis, Minnesota.

Respondent has committed the following unprofessional conduct warranting public discipline:

FIRST COUNT

Myers v. Goodmundson, et al., Litigation and Related Matter

1. The Jordan Area Community Council (JACC) is a nonprofit, citizen participation organization for the Jordan neighborhood in north Minneapolis, Minnesota. For all times relevant herein, respondent, Megan Goodmundson and Dennis Wagner were residents of the Jordan neighborhood and, as a result, members of the JACC.

2. In October 2006, respondent was elected to the JACC board. In November 2006, the JACC board elected respondent as its chair.

3. Between May and August 2008, Dennis Wagner, a JACC board member during 2006 and 2007, filed a series of grievances concerning, among other things, respondent's conduct on the JACC board.

4. On July 5, 2008, Goodmundson filed an ethics complaint with the Director's Office against respondent concerning respondent's involvement with the JACC. On July 18, 2008, the Director issued a determination that discipline is not warranted, without investigation, dismissing Goodmundson's complaint.

5. On or about August 2, 2008, respondent commenced a lawsuit alleging among other things, that Goodmundson, by filing an ethics complaint, defamed respondent.

6. Respondent signed the complaint acknowledging that, pursuant to Minn. Stat. § 549.211, sanctions could be imposed if the action was brought for an improper purpose, was unwarranted under existing law, based on frivolous argument, or lacked evidentiary support.

7. On September 4, 2008, prior to responding to the summons and complaint, Goodmundson's counsel, on behalf of Goodmundson and others, asked that the lawsuit be dismissed. The lawsuit was not dismissed.

8. On September 5, 2008, the defendants filed a joint answer and counterclaim seeking damages for respondent's abuse of process.

9. On or about September 20, 2008, respondent, through his counsel, filed an answer to defendants' counterclaim. Respondent, through his counsel, asked that defendants' claims be dismissed, for an award of punitive damages and for an award of attorney's fees.

10. On October 1, 2008, the defendants filed a notice of amended motion for judgment on the pleadings and to dismiss respondent's complaint pursuant to Minn. Stat. § 554.01, *et seq.*, the Strategic Lawsuits Against Public Participation (SLAPP), which provides immunity for "[l]awful conduct or speech that is genuinely aimed in whole or in part at procuring favorable government action."

11. On November 18, 2008, respondent filed an association of counsel with the court.
12. On December 3, 2008, Judge William R. Howard held a hearing on defendants' motion for judgment on the pleadings and to dismiss Myers' complaint and took the matter under advisement. M.R., Judge Howard's law clerk, attended that hearing.
13. On December 5, 2008, M.R. and E.T., Judge Howard's then law clerks, together with their friend, K.S., attended a holiday party hosted by a Minneapolis law firm.
14. Respondent approached M.R. and inappropriately commented on the matter pending before M.R.'s judge.
15. M.R. told respondent that she could not talk to him about the case since it was under advisement and tried to turn away.
16. Respondent inappropriately touched M.R. and continued to attempt to interact with M.R. M.R. eventually was able to rejoin her friends.
17. On December 12, 2008, M.R. informed Judge Howard about respondent's conduct at the December 5, 2008, holiday party.
18. On December 15, 2008, Judge Howard, citing his belief that respondent's conduct at the December 5, 2008, holiday party had altered the perception that Judge Howard could continue to be fair and impartial, recused himself from the *Myers v. Goodmundson, et al.*, litigation.
19. The matter was reassigned to Judge Charles A. Porter, who on April 13, 2009, reheard defendants' motion for judgment on the pleadings and to dismiss Myers' complaint.
20. On July 10, 2009, the court, citing the "myriad problems with [respondent's] defamation pleadings," granted defendants' motion for judgment on the pleadings, dismissed respondent's defamation claim under the Anti-SLAPP statute with prejudice and ordered judgment for the defendants and against respondent in the

amount of \$2,334.50 for costs and attorney fees incurred in bringing the Anti-SLAPP motion.

21. On July 13, 2009, judgment was entered against respondent and for Goodmundson and Wagner in the amount of \$2,335.01.

22. Respondent paid the judgment in installment payments and received a satisfaction of judgment on or about December 12, 2011.

23. Respondent's conduct violated Rules 3.4(c) and 8.4(d), Minnesota Rules of Professional Conduct (MRPC), and Rule 21(a), RLPR.

SECOND COUNT

E.B. Brown v. Kip Browne Litigation

24. On January 28, 2009, respondent and 14 other former officers, directors, and members of the JACC filed a lawsuit against several defendants, including the City of Minneapolis (*E.B. Brown v. Kip Browne* litigation) alleging intentional interference with contract, breach of fiduciary duty and breach of written contract and seeking equitable relief under the Minnesota Nonprofit Corporation Act, Minn. Stat. §§ 317A.001 - .909 (2010). Respondent and the other plaintiffs, through counsel, also moved for a temporary restraining order (TRO) to invalidate the January 12, 2009, election of the JACC. The defendants in the matter filed their opposition to the TRO.

25. On March 12, 2009, the district court denied the TRO. Respondent and the other plaintiffs, through counsel, then moved for a temporary injunction.

26. On July 10, 2009, after a nine-day evidentiary hearing, the district court denied plaintiffs' temporary injunction. Thereafter, both parties moved for summary judgment.

27. The district court partially granted the defendants' motion for summary judgment and denied plaintiffs' motion for summary judgment filed May 4, 2010.

28. Defendants applied for taxation of costs and disbursements and attorney fees under Minn. Stat. § 317A.751, subdiv. 8, which provides that "[i]f the court finds that a party to a proceeding brought under this section has acted arbitrarily,

vexatiously, or otherwise not in good faith, it may award reasonable expenses including attorneys fees and disbursements, to any of the other parties.”

29. On April 27, 2011, the district court awarded attorneys’ fees in the amount of \$15,000 to defendants, plus costs and disbursements in the amount of \$25,887.37. On June 27, 2011, the court directed immediate entry of final partial judgment, pursuant to Minn. R. Civ. P. 54.02.

30. On June 30, 2011, the plaintiffs appealed the district court’s grant of summary judgment and award of attorneys’ fees and costs and disbursements.

31. On July 2, 2012, the Minnesota Court of Appeals affirmed the district court’s grant of summary judgment and award of \$15,000 in attorneys’ fees. The court of appeals stated that “the district court’s finding that not all of the [plaintiffs’] claims were brought in good faith is supported by the record. After nine days of evidentiary hearings, [plaintiffs] were unable to support a single claim.”

32. The Court of Appeals did not consider plaintiffs’ appeal of the district court’s \$25,887.37 award for costs and disbursements because plaintiffs did not properly object to the defendants’ submission of their sworn application for costs and disbursements within seven days and, therefore, waived this issue on appeal.

33. On August 2, 2012, plaintiffs filed a petition for review with the Minnesota Supreme Court. On October 4, 2012, the Supreme Court dismissed plaintiffs’ petition for review because respondent failed, despite the Supreme Court’s multiple requests, to submit the required filing fees.

34. To date, respondent has not satisfied the \$40,887.37 judgment entered against respondent and the other plaintiffs.

35. Respondent’s conduct violated Rules 3.1 and 8.4(d), MRPC.

THIRD COUNT

P.K. Matter

36. On October 27, 2010, P.K., in the course of her employment as an Assistant Minneapolis City Attorney, was staffing the payable pretrial calendar table in Courtroom 1156 of the Hennepin County District Courthouse.

37. Respondent appeared at P.K.'s table to negotiate on behalf of one or more of his clients. During the course of his conversation with P.K., respondent used inappropriate, lewd and unprofessional language to and about P.K. P.K. was offended and embarrassed by respondent's remarks and directed respondent to leave the counsel table.

38. On November 22, 2010, P.K. was the prosecutor for the City of Minneapolis in the serious traffic courtroom and seated at the counsel table with respondent to her right.

39. On that same date, while negotiating a plea with P.K., respondent again directed inappropriate, lewd, and unprofessional language to P.K.

40. P.K. was offended and embarrassed by respondent's remarks.

41. Respondent's conduct violated Rule 8.4(d) and (g), MRPC.

FOURTH COUNT

Duad Mahad Mohamed Matter

42. Duad Mahad Mohamed retained and paid respondent \$300 to defend him in a petty misdemeanor traffic matter.

43. On December 27, 2011, respondent filed a certificate of representation in the *State of Minnesota v. Duad Mahad Mohamed* matter with Meeker County District Court in Litchfield, Minnesota.

44. By letter dated December 27, 2011, respondent informed the court that Mohamed wanted to enter a not guilty plea and requested a court trial in his matter.

45. On December 27, 2011, the court issued a notice of hearing setting trial for March 7, 2012, at 9:30 a.m. Because English was not Mohamed's first language, the court hired an interpreter to interpret the court proceedings for Mohamed.

46. On March 6, 2012, Rebecca M. Rue, prosecutor for the City of Litchfield, and respondent had several conversations to discuss a plea.

47. During respondent's last conversation with Rue on March 6, 2012, respondent told Rue that he had spoken with Mohamed, that Mohamed did not accept the offered plea, and that Mohamed wanted a court trial.

48. On March 7, 2012, Mohamed, Rue and the interpreter appeared for trial. Respondent did not appear.

49. Respondent did not inform Mohamed that he would not appear at Mohamed's trial on March 7, 2012. Mohamed entered a plea without benefit of counsel.

50. Respondent did not (a) notify the court that he was not going to appear, (b) seek to withdraw and/or (c) have the court's permission to withdraw.

51. Respondent's conduct violated Rules 1.1, 1.2(a), 1.3, 1.4, 1.16(d), 3.4(c), and 8.4(d), MRPC.

FIFTH COUNT

David Wilson Matter

52. On June 11, 2007, David P. Wilson retained respondent in a child support matter. Wilson paid respondent's \$1,500 fee and signed respondent's retainer agreement.

53. Wilson later resolved the matter without respondent's help. In early 2008, Wilson contacted respondent terminating the representation, requesting a refund and an accounting of how his retainer was spent.

54. On or about March 30, 2008, respondent issued check no. 1155 in the amount of \$231.25 payable to Wilson, but did not provide Wilson with the requested accounting.

55. On January 27, 2009, Wilson filed a complaint with the Director. To date, respondent has not provided Wilson with an accounting of the work he performed on Wilson's behalf.

56. Respondent's conduct violated Rules 1.4(a)(4) and 1.15(b), MRPC.

SIXTH COUNT

Failure to Maintain the Required Trust Account Books and Records and Failure to Comply with a Court Order

57. On March 25, 2009, in the course of investigating the David Wilson complaint, the Director requested respondent to provide for the Director's review, among other documents and information, his trust account books and records for the period of June 1, 2007, through disbursement of his refund check to Wilson.

58. Between April 17, 2009, and February 15, 2010, the Director made several requests to respondent that he provide a complete set of his trust account books and records for the period of June 1, 2007, through disbursement of the refund check to Wilson in accordance with Rule 1.15, MRPC, and Appendix 1 thereto.

59. Despite repeated assurances that the requested books and records would be provided and providing some of the trust account books and records related to his trust account, respondent failed to provide a complete set in accord with Rule 1.15, MRPC, and Appendix 1.

60. The Director reviewed the various trust account books and records respondent provided for the purpose of auditing respondent's trust account to determine if respondent, at all times relevant to the David Wilson matter, held sufficient funds in his trust account to pay David Wilson and all other clients for whom respondent held funds in trust. Due to respondent's failure to maintain his trust account books and records in compliance with Rule 1.15, MRPC, as interpreted by Appendix 1 thereto, the Director was unable to complete the audit.

61. On July 8, 2010, the Director advised respondent that his trust account books and records were still incomplete; that respondent provided an incomplete check

register created from respondent's records; identified numerous deficiencies in respondent's records; recommended improvements to respondent's trust accounting procedures; and requested respondent provide additional documents and information by July 22, 2010.

62. In July 2010, respondent's business partner, Dokor Dejvongsa began representing respondent. Between July 2010 and September 2010, Dejvongsa provided additional records.

63. The Director conducted an audit of respondent's trust account based on the records obtained from respondent.

64. On November 19, 2010, the Director provided respondent, by way of counsel, with a trust account check register and client subsidiary ledgers extracted from the Director's audit spreadsheet; advised respondent that the Director's audit showed several instances of possible misappropriation; and that respondent's trust account records failed to comply with Rule 1.15, MRPC, and Appendix 1 thereto. The Director also requested that respondent review the check register and subsidiary ledgers for accuracy; identified various deficiencies and discrepancies; suggested certain improvements to respondent's trust accounting; and requested that respondent provide explanations for the discrepancies and additional trust account books and records. Respondent did not respond.

65. Between December 7, 2010, and May 9, 2011, the Director made repeated requests through Dejvongsa and respondent's subsequent counsel, Jill M. Clark, for information concerning the discrepancies in respondent's trust account. Despite assurances the documents would be forthcoming, the documents were not produced.

66. On May 9, 2011, Clark advised the Director that respondent intended to file a motion in Ramsey County District Court, pursuant to Rule 25, RLPR, contesting the Director's authority to request respondent's trust account books and records.

67. In a May 13, 2011, letter, the Director again requested, through Clark, that respondent provide the information previously requested. Respondent did not provide those records.

68. On July 22, 2011, respondent, through counsel, served upon the Director a notice of motion and motion under Rule 25, RLPR. On January 12, 2012, after being continued at respondent's request three times, the court conducted a hearing on respondent's motion. The court requested and received copies of the Wilson complaint, the Director's February 3, 2009, notice of investigation, and correspondence between respondent and the Director.

69. On April 10, 2012, the court ordered respondent to fully comply with the Director's request for trust account books and records through the date that the refund check cleared respondent's trust account. Respondent was to provide the documents within 10 days. Respondent did not provide the books and records as ordered.

70. On June 11, 2012, the Director wrote to respondent, through lead counsel, requesting that respondent provide, pursuant to the court's April 10, 2012, order, his trust account books and records from June 1, 2007, through January 23, 2009 (the date check no. 1155 for \$231.25 cleared his trust account), within two weeks. Respondent did not provide his trust account books and records.

71. On July 25, 2012, the Director's Office received an email from respondent's lead counsel. Although the June 11, 2012, letter from the Director referenced the district court's April 10, 2012, order, respondent's counsel replied "[w]e cannot find any deadline for this response."

72. On July 27, 2012, December 10, 2012, and April 2, 2013, the Director wrote to co-counsel for respondent's lead attorney and requested compliance with the district court's April 10, 2012, order. Respondent did not provide his trust account books and records.

73. On May 10, 2013, the Director received correspondence from respondent's counsel requesting an extension until May 20, 2013, to gather the records to comply with the district court order.

74. On May 20, 2013, at 8:04 p.m., respondent's counsel faxed an audit sheet indicating it was in compliance with the district court's order. Respondent's counsel further indicated that supporting documents would follow.

75. On May 28, 2013, the Director advised respondent's counsel the submission was not in compliance with the court order because the submission was not the required trust account books and records. The Director also outlined for counsel what the required trust account books and records were and requested that they be forwarded immediately. Respondent did not supply his trust account books and records.

76. On July 1, 2013, respondent's counsel indicated she would be forwarding additional information on respondent's behalf the following week. No submissions were made.

77. On July 12, 2013, the Director again wrote to respondent's counsel about the trust account books and records. The Director reminded respondent's counsel that she had indicated there would be a submission the prior week and the submission had not been made.

78. On July 18, 2013, the Director received a letter from respondent indicating that he was no longer represented by counsel but was seeking new counsel.

79. On July 24, 2013, the Director wrote to respondent and advised him about the outstanding request for information and asking that respondent provide the court-ordered information.

80. On September 24, 2013, respondent forwarded various bank statements to the Director's Office.

81. The Director wrote to respondent on September 30, 2013, and advised respondent that he still was not in compliance with the district court's April 10, 2012,

order and requested that he comply with the district court's order. The Director further outlined what documents were missing.

82. On October 14, 2013, respondent provided various documents concerning the missing trust account books and records.

83. Based on information supplied by respondent, the Director updated the audit being performed on respondent's records. On November 26, 2013, the Director wrote to respondent and enclosed copies of a check register and subsidiary ledgers created by the Director for respondent's trust account. The Director asked respondent to identify and explain various entries. The Director also asked respondent to supply missing trust account documents and also requested information to resolve problems with respondent's trust account.

84. On January 24, 2014, respondent and his former counsel met with the Director's representative. During the meeting respondent indicated he had not been properly maintaining his trust account books and records. Respondent and his former counsel further indicated they were creating the required trust account books and records for the time period in question and that they would be supplying additional information concerning the trust account including documentation to show respondent was currently maintaining his trust account books and records in accord with Rule 1.15, MRPC, and Appendix 1 thereto. The Director confirmed the conversation in a letter dated January 28, 2014.

85. On February 7, 2014, respondent wrote to the Director and indicated he would not be submitting his current trust account books and records to demonstrate he was now properly maintaining his trust account. Respondent additionally indicated he would be supplying additional information on February 18, 2014.

86. The Director advised respondent that he was missing trust account books and records and accepted respondent's deadline of February 18, 2014, for supplying the missing records.

87. On February 18, 2014, and April 10, 2014, respondent provided additional records regarding his trust account.

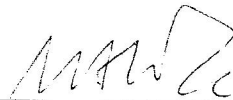
88. As of the date of this petition, despite the district court's April 10, 2012, order and the Director's repeated requests, respondent has not provided for the Director's review the trust account books and records complying with Rule 1.15, MRPC, and Appendix 1 thereto, for the period of June 1, 2007, through January 23, 2009.

89. The Director, therefore, reasonably concludes that respondent failed to maintain his trust account books and records in compliance with Rule 1.15, MRPC, and Appendix 1 thereto, for at least the period of June 1, 2007, through January 23, 2009.

90. Respondent's conduct violated Rules 1.15, 3.4(c), 8.1(b), and 8.4(d), MRPC.

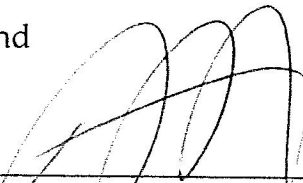
WHEREFORE, the Director respectfully prays for an order of this Court imposing appropriate discipline, awarding costs and disbursements pursuant to the Rules on Lawyers Professional Responsibility, and for such other, further or different relief as may be just and proper.

Dated: March 25, 2015.



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